

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 30547
)
 RUTH M. HOUSEMAN) **BOARD DECISION**
) (Precedential)
)
 From a 2 step reduction in salary)
 for 3 months as an Office Services) **NO. 93-33**
 Supervisor at the Board of)
 Cosmetology, Department of Consumer)
 Affairs at Sacramento.)
) November 2-3, 1993

Appearances: Michael P. White, Attorney representing appellant, Ruth M. Houseman; Marybelle D. Archibald, Deputy Attorney General, on behalf of the respondent, Department of Consumer Affairs.

Before Carpenter, President; Stoner, Vice President; Ward, and Bos
Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Ruth M. Houseman (appellant or Houseman). Appellant was employed as an Office Services Supervisor at the Board of Cosmetology, Department of Consumer Affairs at Sacramento (Department).

Appellant appealed a 2 step reduction in salary for 3 months she received from the Department for selling Avon products during working hours. The ALJ who heard the appeal revoked the salary reduction after concluding first, that Government Code § 19990 which prohibits employment, activities or enterprises which conflict with an individual's duties as a state employee did not apply; and, second, that the Department had not demonstrated that

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appellant had been willfully disobedient.

The Board rejected the Proposed Decision, deciding to hear the case itself. After a review of the entire record, including the transcript, the exhibits, and the written and oral arguments presented by the parties, the Board concludes that the 2 step reduction in appellant's salary for 3 months should be revoked.

FACTUAL SUMMARY

Appellant was appointed in 1968 to the position of Clerk Typist I with the Office of the State Controller. In July of 1978, the Department appointed appellant to the position of Office Services Supervisor I in the Board of Cosmetology. The appellant has not received any prior adverse actions.

During the entire time appellant worked for the Board of Cosmetology, appellant was also an Avon salesperson. On a number of occasions during appellant's employment, various supervisors cautioned appellant against conducting Avon sales on worktime. In 1981, appellant was specifically cautioned not to sell Avon products during her worktime, not to use her state telephone number on Avon brochures and advertising, and not to use the interoffice mail system for Avon orders. Appellant testified that she was well aware of this policy and strictly adhered to it.

Avon advertised new sales campaigns every two weeks. There was testimony from co-worker Wanda Averill that she would call

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appellant during her (Averill's) work break and appellant would accept orders for Avon products. However, the usual means of ordering was that appellant would distribute Avon brochures before working hours, employees would write their orders on "stickies" and stick them on the brochures and appellant would either come by during her lunch hour to pick the orders up, or the employees would drop by appellant's desk and leave the orders on the desk or chair.

Appellant's Avon activities resulted in five to ten Avon sales per month to the employees of the Board of Cosmetology, and other Boards and Commissions which comprise the Department of Consumer Affairs.

In 1985 and again, in 1987, appellant's supervisor brought to appellant's attention the Department's written policy prohibiting the use of state facilities for private sales. Notwithstanding the written policy, the Department never made clear to appellant that it intended to strictly forbid the sale of Avon products at the worksite even during non-working time. In fact, appellant's supervisor, Marjorie Jurach, purchased an Avon product from appellant in November or December of 1990. Thus, appellant was led to believe that so long as she adhered to the restrictions set forth in the 1981 memorandum, she would be in compliance with the Department's policy.

In May of 1991, two workers from another department came by appellant's office while appellant was not there. These women

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asked appellant's supervisor, Marjorie Jurach, if they could drop off an Avon order. Jurach refused to allow them to leave the order. Later, in June or July, Jurach was disturbed that the employees she supervised were reading Avon literature at a time they should have been working.

The two occurrences described above prompted Jurach to write a memorandum to appellant in an apparent attempt to clarify and tighten the policy regarding Avon sales. The subject of the July 11, 1991 was "Sales to Office Personnel During Working Hours."

The text of Ms. Jurach's memo was as follows:

It has been brought to my attention that you are selling Avon products during working hours.

This matter has been discussed with you since 1985 and you continue to disrupt other employees during their work hours. Therefore, you are not to receive inquiries or orders at this worksite.

In June 1988 Departmental Memorandum 88-11 (see attached)¹ was distributed which indicated that worktime sales such as Avon are inappropriate.

As a supervisor it is imperative that you not only enforce the policies of this department, but that you observe the policies yourself. (emphasis added).

On July 16, 1991, during her lunch hour, appellant went to the Board of Pharmacy to deliver an Avon order for a Mrs. Kubo. Mrs. Kubo was not in. Appellant asked the receptionist, Cecilia

¹ The Memorandum dated June 21, 1988 which was attached to this memo was a reminder to all employees that solicitation by private vendors, whether by telephone or in person, was inappropriate during state time.

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DeCuir, to drop the package on Mrs. Kubo's desk. Appellant was on her lunch hour but DeCuir was not. DeCuir testified "Ruth also stated that she was not to be selling and to inform others not to come in and ask for her. They were to telephone her. She then gave me her number." The Department was unable to demonstrate that appellant gave DeCuir her work number. The ALJ who heard the testimony and is best able to judge the memory and credibility of witnesses found that the number appellant gave DeCuir was her home phone. Appellant testified that she believed DeCuir was on her lunch hour because DeCuir was eating something.

On July 17, 1991, appellant responded to Ms. Jurach's memo of July 11, 1991. Appellant maintained that she followed the June 21, 1988 "solicitation" memorandum to the letter. Neither appellant or Jurach recall discussing Jurach's memo one-to-one.

Appellant was on vacation on August 8, 1991, when Jurach opened an interoffice envelope addressed to appellant which included two Avon orders from other Department employees. Jurach notified appellant that adverse action would follow.

Appellant was charged with violations of Government Code § 19572, subdivisions (o) willful disobedience, (p) misuse of state property, (r) violation of the prohibitions set forth in accordance with Section 19990 and (t) other failure of good behavior.

The Notice of Adverse Action stated:

You have been selling Avon products to other employees during worktime. Orders have been sent to you using the

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state mail system. You have previously been advised that workplace solicitation by private vendors, whether by telephone or in person is inappropriate and unacceptable. As recently as July 11, 1991, you were instructed by your supervisor to stop receiving inquiries about or orders for Avon products. Yet you thereafter failed and/or refused to comply with your supervisor's instruction. You have continued to sell and make deliveries of Avon products during worktime. Your activities have disrupted not only your own work but also the work of other employees as they respond to your solicitation or handle your deliveries of Avon products.

ISSUES

The following issues are before us for determination:

(1) Whether a preponderance of evidence supported the charge that appellant engaged in Avon activities during working hours on State property;

(2) If so, did appellant's activities constitute cause for discipline under the causes cited in the Notice of Adverse Action?

DISCUSSION

Appellant is charged with selling Avon products during working hours. There is no evidence that appellant sold Avon products during her working hours.

There is one incident in which appellant, who was on her lunch hour, asked DeCuir, who was not on her lunch hour, to drop a package on another employee's desk. This incident is representative of all the evidence in this action. The question throughout is not whether appellant was on her lunch hour but

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whether her prospective customers were on their breaks and lunch hours when they called, when they dropped off orders, or when they discuss Avon products.

Willful Disobedience

Appellant is charged with a violation of Government Code, § 19582 (o), willful disobedience, for disobeying the instruction contained in her supervisor's July 11, 1991 memo. The memo instructed: "You are not to receive inquiries or orders at this worksite." The Notice of Adverse Action charged appellant with failing or refusing to comply with this order. However, no evidence was presented that appellant intentionally disregarded this instruction. The evidence indicated only that, on one occasion, appellant attempted to deliver a package to an employee of the Board of Pharmacy, the Board of Cosmetology's neighbor, during appellant's lunch hour and that, on another occasion, other employees sent orders to appellant while appellant was on vacation.

Jurach testified that she considered her prohibition against "receiving inquiries and orders at the worksite" to mean that appellant was not to perform any Avon work at all at the Department of Consumer Affairs. Unfortunately, Jurach did not discuss her expectation with appellant. Appellant apparently interpreted the memo to mean that, as in the past, she was not to use work time to conduct Avon business. The language of the memo itself (see p. 3, supra) is susceptible to appellant's interpretation, especially

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when it is read in the context of the parties' past practice: some parts of the memo refer to a prohibition from selling during worktime; another part proscribes receiving inquiries or orders at the worksite.

Although appellant's receipt of two orders while she was on vacation may technically violate the July 11, 1991 memo, the mere receipt of the orders cannot be attributed to appellant. The Department has not demonstrated that appellant is in any way responsible for the actions of the employees who sent the orders. Willful disobedience requires that one knowingly and intentionally violate a direct command or prohibition. (Coomes v. State Personnel Board (1963) 215 Cal.App.2d 770, 775.) The Board declines to find that appellant intentionally violated a direct order.

The charge of willful disobedience is dismissed.

Misuse of State Property

Appellant is also charged with misuse of state property. Scant evidence was presented that appellant misused state property.

Two Department employees used the interoffice mail system to mail orders to appellant, but no evidence was presented that appellant had instructed them to do so or that this was appellant's usual means of conducting business. The Department argues that appellant presented no evidence that she discouraged the use of the mail system. The Department forgets that it carries the burden of

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proving by a preponderance of evidence the charges against appellant.

Wanda Averill testified that she intermittently used the state telephone to place an order with appellant. This, of course, must mean that appellant received the call on a state telephone. While this telephone use technically constitutes misuse of state property, especially on the part of the caller, we are reluctant to find that appellant's mere receipt of a few calls without more, constitutes actionable misuse of state property.²

There is evidence that when appellant was not at her desk, employees would place their orders on appellant's desk or on her chair. The Department claims that this is misuse of the state work area. As early as 1981, the Department of Consumer Affairs promulgated a rule which identified "[p]roviding or using in a private enterprise, for gain or profit, any of the facilities of this Department (which shall be inclusive of information as well as physical property)" as an activity incompatible with state

² We do not mean to suggest that the receipt of calls relating to personal business on state telephones could never constitute misuse of property. Had the evidence established that the buying and selling of Avon products at the workplace was clearly prohibited, and that appellant encouraged the calls, or that the calls were numerous or lengthy, a case for misuse of state property might be established. Notably, the evidence established that appellant made only a very few sales a month, and there is no evidence that all of these sales involved the use of state telephones.

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employment. This rule was brought to appellant's attention at least twice in the years 1981 to 1985. However, nothing in the record indicates that appellant was ever notified that she was not to allow other employees to drop orders off at her desk. In fact, Ms. Jurach, ordering an Avon product the year before, dropped off her Avon order by placing it on appellant's desk or chair.

Absent a clearly enunciated and consistently enforced policy forbidding all commercial transactions at the worksite, the Board declines to find that allowing employees to drop orders on appellant's desk constitutes misuse of state property.

Other Failure of Good Behavior

The Department charges appellant with a violation of section 19572, subdivision (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment. The ground for the charge is that appellant is a supervisor and that her sale of Avon products at the workplace sets a bad example for others. Having found that appellant did not sell Avon products during worktime, the Board finds this charge completely unsupported.

Application of Government Code § 19990

Government Code § 19990 provides in pertinent part:

A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

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Each appointing power shall determine, subject to approval by the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees.

Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

...(b) Using state time, facilities, equipment or supplies for private gain or advantage.³

Thus, section 19990 clearly grants to the appointing power the right to determine what is and is not incompatible with state employment. The Department's own rules mirror provision (b) by prohibiting an employee from "[p]roviding or using in a private enterprise, for gain or profit, any of the facilities of this Department (which shall be inclusive of information as well as physical property)."

Although the Department could have relied on section 19990 and its own rules to preclude all commercial transactions on the premises, the Department did not do so. The Department did not

³ Section 19990 also describes as incompatible with state service activities which

...(g) Subject to any other laws, rules or regulations as pertain thereto, [result in an employee] not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

Appellant has not been charged with inefficiency. Therefore, this section is not relevant.

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consistently interpret its policy as barring all Avon activities at the worksite. Instead, the Department gave appellant mixed and often ambiguous messages for more than 10 years regarding its expectations with respect to her Avon sales activities at the workplace.

In their article, "Toward a Theory of 'Just Cause' in Employee Discipline," (June 1985), authors Roger I. Abrams and Dennis R. Nolan state that the due process embodied in the concept of just cause discipline includes "actual or constructive notice of expected standards of conduct...". In 1981, appellant was given certain restrictions to abide by in selling Avon products at the worksite. The restrictions proscribed the selling of Avon products during work time. Appellant was led to believe that so long as she abided by said restrictions she was not in violation of the Department's policy.

The Department is now taking the position that appellant was strictly prohibited from selling any Avon products at any time at the worksite. Appellant was not clearly notified that the expected standards of conduct had changed. The Department cannot now discipline appellant for violating standards that were never clearly enunciated or consistently enforced. The charge of violation of Government Code, § 19990 cannot be sustained.

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CONCLUSION

For all of the reasons set forth above, the adverse action is revoked.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The above-referenced adverse action of a 2 step reduction in salary for 3 months is revoked;

2. The Department of Consumer Affairs shall pay to appellant Ruth M. Houseman all back pay and benefits that would have accrued to her had she not been subjected to a 2 step reduction in salary for 3 months.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

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4. This opinion is certified for publication as a Precedential Decision (Government Code section 19582.5).

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member
Floss Bos, Member

*Member Alfred R. Villalobos was not a member of the Board when this case was originally considered and did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 2 and 3, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board